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FCC 95-387

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D C 20554

In the Matter of	)	
	)	
Petition of the Connecticut	)	
Department Public Utility Control	)	
To Retain Regulatory Control of	)	PR Docket No. 94-106
Wholesale Cellular Service	)	
Providers in the State of	)	
Connecticut	)	

**ORDER**

**Adopted:** September 1, 1995;      **Released:** September 5, 1995

By the Commission:

**I. Introduction**

1. On May 8, 1995, the Commission adopted an order denying the petition of the Connecticut Department of Public Utility Control (DPUC), on behalf of the state, requesting authority to continue regulating the rates of wholesale cellular service providers.<sup>1</sup> On July 13, 1995, DPUC and the Attorney General of Connecticut (petitioners) requested a stay of the *Connecticut Order* pending disposition of their petition for review of the *Connecticut Order* in the United States Court of Appeals for the Second Circuit.<sup>2</sup> Bell Atlantic NYNEX Mobile (Bell Atlantic), McCaw Cellular Communications, Inc. (McCaw), Springwich Cellular Limited Partnership (Springwich), and the Cellular Telecommunications Industry Association (CTIA) filed oppositions to the Stay Motion.<sup>3</sup> For the reasons set forth below,

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<sup>1</sup> *Report and Order*, Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Service Providers in the State of Connecticut, PR Docket No. 94-106 (released May 19, 1995) (*Connecticut Order*).

<sup>2</sup> Motion for Stay of the Connecticut Department of Public Utility Control and the Attorney General of Connecticut, PR Docket No. 94-106, dated July 13, 1995 (Stay Motion); *Connecticut Department of Public Utility Control v. F.C.C.*, Docket No. 95-4108 (2d Cir., filed July 14, 1995).

<sup>3</sup> Opposition to Motion for Stay filed by Bell Atlantic NYNEX Mobile, PR Docket No. 94-106, filed July 21, 1995 (Bell Atlantic Opposition); Opposition to Motion for Stay filed by McCaw Cellular Communications, Inc., PR Docket No. 94-106, filed July 21, 1995 (McCaw Opposition); Opposition of Springwich Cellular Limited Partnership to Motion for Stay, PR Docket No. 94-106,

we find that petitioners have failed to show that they are entitled to the relief they have requested. We therefore deny their motion for a stay of the *Connecticut Order*.

## II. Background

2. In 1993, Congress amended the Communications Act to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.<sup>4</sup> Congress provided that, as of August 10, 1994, no state or local government shall have the authority to regulate "the entry of or the rates charged" for commercial mobile radio services (CMRS) or private mobile radio services (PMRS).<sup>5</sup>

3. Congress provided, as a limited exception to the general rule prohibiting states from regulating CMRS rates, that if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."<sup>6</sup>

4. On August 8, 1994, DPUC, on behalf of the State of Connecticut, filed a petition with this Commission, requesting authority under Section 332(c)(3)(B) to continue regulating the rates of wholesale cellular service providers.<sup>7</sup> We based our denial of the Connecticut Petition in part on the fact that the DPUC itself had failed to find, at the conclusion of its investigation of cellular market conditions one year ago, that the cellular carriers' rates of return and financial performance "demonstrated unjust or unreasonable, or unjustly or unreasonably discriminatory rates."<sup>8</sup> We also listed the following five specific reasons for the denial of the Connecticut Petition: (1) there was un rebutted evidence that cellular rates in Connecticut were declining; (2) DPUC did not address the "direct and fundamental changes" to the cellular market due to personal communications services (PCS)

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filed July 21, 1995 (Springwich Opposition); and Opposition of the Cellular Telecommunications Industry Association. PR Docket No. 94-106, filed July 21, 1995 (CTIA Opposition).

<sup>4</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (OBRA or Budget Act), *codified in principal part at* 47 U.S.C. § 332.

<sup>5</sup> See 47 U.S.C. § 332(c)(3)(A).

<sup>6</sup> See 47 U.S.C. § 332(c)(3)(B).

<sup>7</sup> Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR File No. 94-106, filed August 8, 1994 (Connecticut Petition).

<sup>8</sup> *Connecticut Order*, ¶ 68.

and other services; (3) DPUC presented no evidence of "systematically collusive or other anticompetitive practices" concerning the provision of cellular service or any CMRS; (4) DPUC presented no evidence of widespread consumer dissatisfaction with CMRS providers; and (5) DPUC failed to analyze the "critical issue" of investment by cellular licensees.<sup>9</sup> Moreover, because DPUC had not prescribed any pricing or rate formula, we found that, with minor exceptions, all cellular rate changes had been carrier-initiated.<sup>10</sup> Therefore, we were not persuaded that absent continuation of rate regulation authority, cellular rates in Connecticut would quickly fall outside the "zone of reasonableness."<sup>11</sup> Lastly, we considered, and rejected, each of DPUC's specific allegations.<sup>12</sup>

### III. Summary of Pleadings

5. Petitioners contend that they are entitled to a stay of the *Connecticut Order* because they have satisfied the four-part test that has been applied by the courts and the Commission.<sup>13</sup> Petitioners' allegations are summarized as follows.

6. First, petitioners assert that they are "likely to prevail on appeal" because the *Connecticut Order* is "fatally flawed."<sup>14</sup> Specifically, petitioners argue that the "standard under which the Commission decided the DPUC's petition . . . is substantially different from the standard delineated [previously by the Commission] in the [CMRS] *Second Report and Order*," the Commission proceeding that implemented OBRA.<sup>15</sup> For example, among other things, petitioners allege that the Commission for the first time found that evidence concerning the reinvestment of profits in the CMRS industry and concerning future market conditions would be of "overriding significance" or of "decisional importance."<sup>16</sup> Petitioners further contend that, in addition to having applied the "wrong standard," the Commission

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<sup>9</sup> *Id.*, ¶ 69.

<sup>10</sup> *Id.*, ¶ 70.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, ¶¶ 71-77.

<sup>13</sup> Stay Motion at 2-3 (citing *Cuomo v. United States Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985)).

<sup>14</sup> *Id.*, at 3.

<sup>15</sup> *Id.*; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994), *reconsideration pending* (CMRS *Second Report and Order*).

<sup>16</sup> Stay Motion, at 4-5.

"erred in its findings and grossly distorted the record evidence."<sup>17</sup> Petitioners assert that the record shows that PCS was a "central focus of the DPUC's pre-petition hearings," that the cellular carriers are engaging in a "variety of anti-competitive and discriminatory practices," and that any rate changes were not "voluntary" but instead resulted from DPUC's "light-handed form of regulation."<sup>18</sup>

7. Second, petitioners contend that they will suffer irreparable harm in the absence of a stay of the *Connecticut Order*. Because petitioners claim that they seek only to retain regulatory authority until July 1996, or at the latest October 1997, they argue that a "successful appeal will be rendered largely meaningless" because the litigation of the appeal will consume the period during which they seek to continue regulatory authority.<sup>19</sup> In addition, petitioners contend that the State of Connecticut and Connecticut cellular consumers will suffer irreparable injury because the wholesale cellular providers, "if left to their own devices," would "have the potential to use their market power to the disadvantage of new entrants" and thus adversely affect consumers.<sup>20</sup> Lastly, petitioners assert that attempts to "undo" this alleged damage would involve "serious administrative problems" because petitioners would be shifting back and forth between "a regulated and unregulated environment."<sup>21</sup>

8. Third, petitioners contend that no party will suffer harm from a stay of the *Connecticut Order* because the stay would "preserve the status quo under which the parties have been operating and providing service."<sup>22</sup>

9. Fourth, petitioners contend that the public interest will be served by granting a stay of the *Connecticut Order* because "it would be a grave disservice to the public interest if the State Movants prevail on the merits of their appeal, yet consumers are left unprotected during the period in which the appeal is litigated "<sup>23</sup>

10. Bell Atlantic, McCaw and Springwichee all contend that petitioners are *not* likely to succeed on the merits of their appeal because, *inter alia*, the types of information considered in the *Connecticut Order* plainly were within the broad types of information listed

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<sup>17</sup> *Id.*, at 6.

<sup>18</sup> *Id.*, at 6-8.

<sup>19</sup> *Id.*, at 8-9.

<sup>20</sup> *Id.*, at 9-10.

<sup>21</sup> *Id.*, at 10.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at 10-11.

in the *CMRS Second Report and Order*.<sup>24</sup> Moreover, Bell Atlantic, McCaw, Springwich and CTIA all assert that the record amply supports the Commission's finding that rate regulation of the Connecticut CMRS market is unnecessary.<sup>25</sup>

11. Bell Atlantic, McCaw and Springwich all assert that petitioners have failed to demonstrate irreparable harm with the requisite level of specificity.<sup>26</sup> In addition, CTIA asserts that petitioners could cure any harm by imposing rate regulation after the Second Circuit rules on the merits of petitioners' appeal.<sup>27</sup>

12. As to harm to other parties, Springwich asserts that granting a stay of the *Connecticut Order* would, in fact, alter the status quo because Springwich already has offered new services to its reseller customers without the regulatory burdens involved in filing tariffs.<sup>28</sup> Springwich further contends that a stay would cause it harm because it would continue to be subject to rate regulation while new competitors are not.<sup>29</sup> CTIA alleges that as of the effective date of the *Connecticut Order*, CMRS carriers began "developing business plans that did not contemplate continued DPUC authority over CMRS services" and, consequently, that these carriers would be harmed if the stay is granted.<sup>30</sup> Lastly, Bell Atlantic argues that a stay would harm CMRS providers and cellular customers by delaying competition in Connecticut.<sup>31</sup>

13. Lastly, with respect to the public interest, CTIA argues that granting the stay would not be in the public interest because, in OBRA, Congress "envisioned a competitive marketplace for CMRS services and recognized that to ensure the continued competitiveness

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<sup>24</sup> Bell Atlantic Opposition, at 5-6; McCaw Opposition, at 3-4; Springwich Opposition, at 8-11.

<sup>25</sup> Bell Atlantic Opposition, at 6-8; McCaw Opposition, at 3-4; Springwich Opposition, at 12-16; CTIA Opposition, at 5-6.

<sup>26</sup> Bell Atlantic Opposition, at 8-9; McCaw Opposition, at 5; Springwich Opposition at 5-6.

<sup>27</sup> CTIA Opposition, at 7.

<sup>28</sup> Springwich Opposition, at 2-4. Springwich explains that shortly after DPUC's regulatory authority expired, Springwich began offering a service known as Directory Assistance Call Completion (DACC), which permits a caller who obtains a telephone number from directory assistance to automatically complete the call by pressing "1" or by so instructing the operator. *Id.* If state rate regulation were still in effect, Springwich explains, it would have had to file a tariff and obtain regulatory approval before offering this service. *Id.*

<sup>29</sup> Springwich Opposition, at 6.

<sup>30</sup> CTIA Opposition, at 8.

<sup>31</sup> Bell Atlantic Opposition, at 10-11.

of the wireless industry, a single federal regulatory framework must exist." Therefore, CTIA contends, if the stay is granted, "an important government interest will be derailed."<sup>32</sup>

#### IV. Discussion

14. In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Jobbers*"), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate: (1) that they are likely to succeed on the merits on appeal;<sup>33</sup> (2) that they would suffer irreparable injury absent a stay; (3) that a stay would not substantially harm other interested parties; and (4) that a stay would serve the public interest.<sup>34</sup> A petitioner must satisfy each of these four tests in order for the Commission to grant a stay.

15. Petitioners have not satisfied any of the four factors for granting a stay. We address here only their failure to show that they will suffer irreparable injury absent a stay, that no parties would be harmed by a stay, and that the public interest weighs in favor of granting a stay.

16. Petitioners fail to carry their burden of establishing irreparable injury in the absence of a stay. The standard of proof for irreparable injury is quite high, as it is well settled that such injury "must be both certain and great" and "must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1984). The evidence of injury offered by petitioners in contrast is speculative and thus, uncertain. For example, the "administrative problems" petitioners allege will result from shifting back to a regulated environment if they are successful in their appeal are not described or otherwise explained. Moreover, because the *Connecticut Order* was adopted several months ago, it appears that the Connecticut wholesale cellular market presently is not subject to state rate regulation and that, therefore, the very same "administrative problems" would be involved in re-regulating the Connecticut market if we were to grant a stay. Further, petitioners offer no evidence that the wholesale cellular carriers "if left to their own devices" would set rates in a manner that adversely affects consumers. Indeed, wholesale cellular rates have been decreasing in Connecticut, even though petitioners have practiced, at most, "light-handed" regulation. Thus, there is no basis for asserting that irreparable injury is certain or will be great.

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<sup>32</sup> CTIA Opposition, at 9.

<sup>33</sup> The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on the other factors is particularly strong. *Expanded Interconnection of Local Company Facilities*, 8 FCC Rcd 123, 124 n.10 (1992).

<sup>34</sup> See also *All Funds in Accounts in the Names Registry Publishing, Inc.*, \_\_\_ F.3d \_\_\_, 1995 WL 394058 (2d Cir., June 26, 1995).

17. Moreover, petitioners' choice to file their Stay Motion only after their rate regulation authority expired also indicates the absence of irreparable injury. Although the *Connecticut Order* was adopted on May 8, 1995, petitioners did not file a petition for review of the *Connecticut Order* until July 14, 1995 and did not file the Stay Motion until July 13, 1995. Petitioners have not alleged that any harm has occurred during the several months that Connecticut has had no rate regulation authority. Petitioners also have not presented us with any reason to believe that the Second Circuit will not rule on the merits of petitioners appeal within a timeframe that would grant petitioners meaningful relief. Therefore, on balance, petitioners have not shown irreparable injury.

18. Petitioners also have not carried their burden of showing that no parties will be harmed by the requested stay. Indeed, petitioners allege only that a stay would preserve the "status quo" and that, consequently, no parties would be harmed. As described above, however, due to petitioners' decision to wait until July to request a stay, it appears that the "status quo" in Connecticut is that the state has no regulatory authority. In addition, as described above, specific harms have been alleged by both Springwichee (delay in offering its new directory-assisted calling service and competitive disadvantage because new competitors would be free from regulation) and CTIA (carriers have developed business plans in reliance on the absence of state regulatory oversight). Consequently, petitioners have not shown that other parties will not be harmed by a stay.

19. Lastly, we find that a stay of the *Connecticut Order* is not in the public interest. Congress has defined the public interest to be that, as a general rule, there shall be no state regulation of CMRS rates.<sup>35</sup> Indeed, OBRA expresses a preference in favor of "reliance on market forces rather than regulation." Thus, the public interest, as expressed through OBRA, is for there to be as little regulation as possible. Section 332(c)(3)(A) and (B) creates an *exception* to this *general* prohibition against state rate regulation. Granting the Stay Motion would turn this limited exception into the general rule and stand Congress' vision of the public interest on its head. Absent proof by petitioners of harm to consumers (or any party), we cannot find that they have made a showing that a stay would be in the public interest.

20. For the foregoing reasons, we find that petitioners have failed to sustain the heavy burden required to justify a stay of the *Connecticut Order*.

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<sup>35</sup> 47 U.S.C. § 332(c)(3).

## V. Ordering Clause

21. Accordingly, IT IS ORDERED that the motion for stay filed by the Connecticut Department of Public Utility Control and the Attorney General of Connecticut IS DENIED.

Federal Communications Commission

A handwritten signature in black ink, appearing to read "William F. Caton".

William F. Caton  
Acting Secretary